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IN THE

Supreme Court of the United States

October Term, 1967

No. 237

ARCHIE NATHANIEL BIGGERS,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF FOR PETITIONER

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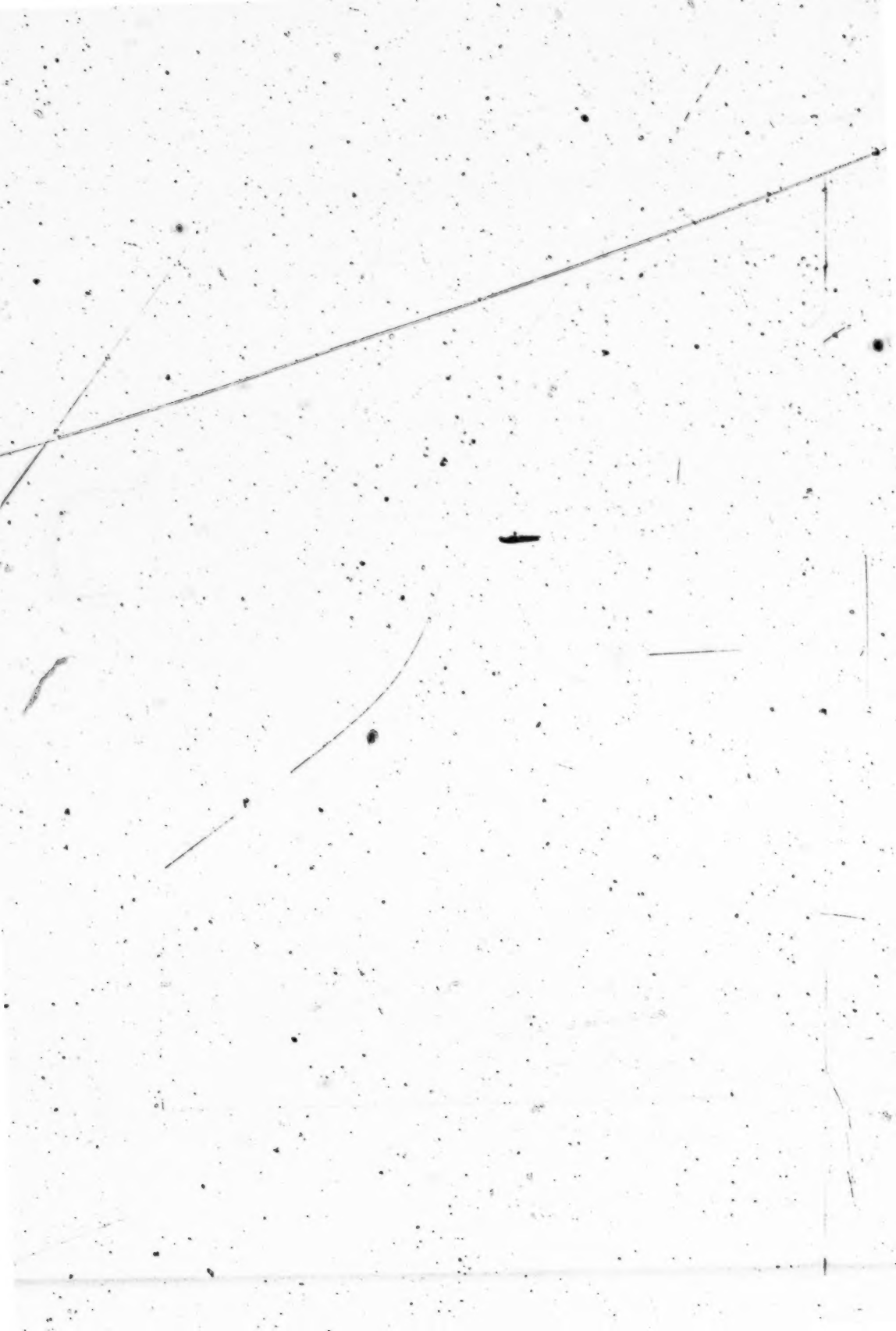

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BRIEF FOR PETITIONER

Opinion Below

The opinion of the Supreme Court of Tennessee (R. 202-06) is reported at —— Tenn. ——, 411 S.W.2d 696 (1967). The judgment of the Supreme Court of Tennessee (R. 207) and its order denying rehearing (R. 219) are unreported.

Jurisdiction

The judgment of the Supreme Court of Tennessee was entered on January 12, 1967 (R. 207). Rehearing was denied March 1, 1967 (R. 219). Petition for writ of certiorari was filed April 1, 1967 and was granted June 12, 1967. The jurisdiction of this Court rests on 28 U.S.C. §1257(3), petitioner having asserted below and here the deprivation of rights secured by the Constitution of the United States.

Constitutional Provisions Involved

This case involves the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Questions Presented

To permit identification by the prosecutrix, the police compelled petitioner, a 16 year-old Negro boy, to repeat words spoken by her assailant during the offense seven months earlier. There was no lineup; petitioner was alone in their custody at the police station.

1. Was petitioner denied due process of law when convicted of rape solely on the basis of testimony of this pretrial identification.

2. Whether the state violated petitioner's privilege against self-incrimination by compelling him to speak the words used by the criminal at a pre-trial identification and introducing the compelled statement as direct evidence against him at trial.

Statement

On the night of January 22, 1965, Mrs. Margaret Beamer, a 39-year old Negro woman, was raped by an intruder. Brandishing a large butcher knife the assailant entered her house through a rear door, grabbed her from behind in an unlit hallway and threw her to the floor (R. 9, 10). Mrs. Beamer's attention was drawn to the attacker's knife and she was unable to describe the rapist other than to state that he was large, had a youthful voice, soft skin, and "sort of bushy" hair (R. 14, 17, 18, 50). The record does not show whether she reported these characteristics

to the police immediately following the crime; only that she testified to identifying petitioner on the basis of them at a police station seven months later (R. 14, 17).

Hearing her mother shout, Mrs. Beamer's 13-year old daughter ran into the hallway (R. 83). She approached within a foot of the intruder, whose face was turned toward her, before being ordered back into her bedroom (R. 90, 91). The intruder then took Mrs. Beamer out of the house through an unlit kitchen to a nearby patch of woods where he raped her. The events surrounding the crime lasted some 10 to 30 minutes (R. 26, 85). During the following seven months, the police requested Mrs. Beamer to look at police photographs on several occasions and although she identified the picture of one man as "having features" like the rapist, the case lay dormant (R. 15, 25, 38, 39, 50, 51, 64, 65, 74).

On August 17, 1965, Archie Nathaniel Biggers, a 16-year old Negro, was arrested at 1:30 A.M. and allegedly identified by a white woman as the person who had attempted to rape her earlier that night (R. 196). An August 17th edition of the Nashville *Tennessean*, a morning newspaper, carried a front page story of the assault and arrest (R. 196). Biggers, although not named, was described as a "burly-16-year old Negro." According to the article, he had been identified by the victim; the police were questioning him in connection with similar incidents and would confront him with victims of these earlier incidents. An August 18th edition of the paper showed a picture of Biggers entering jail and stated that he had confessed to attacking the white woman, Mrs. Carrie Silverman, that Mrs. Beamer had identified him as her attacker, and that two other attempted rape victims could not identify him. Biggers' mother reportedly had retained an attorney the day he was arrested (R. 197, 46, 47). At trial, the State

initiated reference to newspapers accounts of Biggers' arrest in order to establish that Mrs. Beamer had identified Biggers before his photograph appeared on August 18th (R. 17). The record does not show whether Mrs. Beamer had seen the first story in the *Tennessean* published the morning of the 17th (R. 17, 24).

On the day of Biggers' arrest the police went to Mrs. Beamer's home and brought her to the police station, as one officer put it, to "look at a suspect" in one of the rooms in the detective division (R. 24, 25, 39, 65, 77, 78). The police brought Biggers into the adjoining hall and then to the doorway of the room in which the prosecutrix was seated (R. 40, 66, 80).[1] Mrs. Beamer saw Biggers in the doorway in the presence of "quite a few"—at least five—policemen (R. 39, 48, 65, 73, 79). Neither his parents nor attorney had been notified of the identification. Mrs. Beamer asked the police to have Biggers speak and the police instructed him to repeat words spoken by the rapist at the time of the offense: "Shut-up, or I'll kill you." (R. 18, 66, 68, 69, 78, 79). Only after she heard him speak the rapist's words did Mrs. Beamer identify Archie Biggers as the man who had raped her (R. 17).[2]

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[1] After his arrest, early in the morning of August 17, 1965, Biggers was lodged in a juvenile detention facility. Later he was transferred to the custody of the police department in order to be confronted by Mrs. Beamer. At trial, a police officer was asked by what authority Biggers was removed from juvenile detention. He stated "Well, we had papers that he was ruled incorrigible which they signed out there, so that they could—" (R. 52). This statement should not be read to imply that the decision to release Biggers to the police on August 17th was reached after a judicial proceeding in the junvenile court, for Biggers was not remanded to the Sheriff of Davidson County, Tennessee, to be dealt with as an adult, until August 24, 1965.

[2] One officer present testified that Mrs. Beamer identified Biggers before he spoke (R. 80), but Mrs. Beamer herself stated reliance on his voice for identification (R. 17). Another officer and petitioner also testified that she requested him to speak prior to naming him as the rapist (R. 66, 107, 108).

Petitioner was indicted for the rape of Mrs. Beamer on October 1, 1965 and tried two months later (R. 1, 6). At trial, the only evidence connecting him with the rape was Mrs. Beamer's stationhouse identification. Her thirteen-year old daughter testified to what she saw but was unable to identify Biggers as the rapist (R. 83). On direct examination, Mrs. Beamer testified that she had identified Biggers at the police station on the basis of his general size, voice, and skin and hair texture but she did not identify Biggers in the courtroom. Biggers' voice was described as that of an "immature youth," who talked "soft" in a "medium pitched" voice (R. 17-19).

On direct examination four of the five police officers who were present at the pre-trial identification described Mrs. Beamer's identification of Biggers at the police station (R. 39, 48, 66, 75). At one point petitioner's counsel objected that this testimony served to bolster the impact of the identification on the jury but the objection was overruled (R. 75, 76).[3]

Petitioner testified in his own behalf and denied that he committed the act charged. He also told the jury that the police directed him to speak the words of the rapist and that Mrs. Beamer did not identify him until after he had spoken (R. 107, 108). Biggers' mother, stepfather, and seven friends and neighbors testified that petitioner was an obedient and truthful young man of good reputation who had never before been in "trouble" (R. 116-74).

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[3] "Mr. Williams: —that it is immaterial,—that I objected to on the other—it is immaterial and incompetent. She has already testified with regard to how identification—and that identification has to be weighed by the Jury on the basis of what she has testified, not on the basis of what—of this happened—a test to try to build it up by having about three or four police officers come in here and say, Why, yeah, I saw her identify him. That is not evidentiary, your Honor." (R. 75).

In his summation, the prosecuting attorney characterized the issue in the case as one of identification (R. 177, 181). He repeated Mrs. Beamer's identification testimony and related a story concerning a case that he had tried, the point of which was that "violence and terror" result in accurate identification.[4] On the basis of Mrs. Beamer's identification, the only evidence linking petitioner to the rape, the jury found Archie Biggers guilty and he was sentenced to the State Vocational Training School for Boys for twenty years (R. 4, 193-195).[5] On appeal, the Supreme Court of Tennessee rejected petitioner's constitutional claim that his identification was "so fundamentally unfair and oppressive as to invalidate all evidence flowing therefrom" (R. 200, 204-06).

SUMMARY OF ARGUMENT

I.

The police directed the attention of the witness to petitioner by exhibiting him for identification alone while in their custody at a stationhouse. As recognized by this Court in *Stovall* v. *Denno*, 388 U.S. 293 (1967) presenting an accused for identification without a lineup is grossly suggestive, constituting a violation of due process absent imperative reasons for failing to hold a lineup not present

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[4] "After that case was concluded one of the Jurors came to me, he said, you know, Mr. Hollins, when I was in the Army, World War I—World War II, I was in the trenches and I looked up and saw a big German soldier, with a bayonet, standing over me. Somebody shot him and I was saved. But he says you know if I saw that soldier walking down the street today I would recognize him. And there's something about the violence and terror of the situation that fixes these matters indelibly in a person's mind. And if you don't think that is true, then you acquit this defendant." (R. 177).

[5] Although Biggers was originally sentenced to an institution for youthful offenders, he has been placed in the Tennessee State prison, a facility for adults.

in this case. In addition, to use of such a "showup", this case presents circumstances which unnecessarily prejudiced a fair trial. The witness was open to suggestive influences before the identification, for opportunity to observe the assailant was insufficient and the crime had occurred seven months earlier. She relied particularly on her memory of a voice. The police labelled petitioner a "suspect" before showing him, made him speak the identical words used by the rapist, and presented him for identification surrounded by policemen. His family and counsel were not present although petitioner was only 16 years old. At trial, the pre-trial identification was the only evidence of guilt. In an attempt to bolster the identification before the jury, four policemen reiterated its circumstances. The victim's daughter, however, could not identify petitioner and the victim did not attempt to identify him in the courtroom. By presenting petitioner in such a manner as to encourage positive identification and by sole reliance on the tainted pre-trial identification, the state precluded a meaningful confrontation at trial.

II.

Petitioner was instructed by the police to speak the words of the rapist—"Shut up, or I'll kill you"—in order to enable the victim to identify him and evidence of what he said was introduced by the state against him at trial. Use of such evidence by the state constitutes compulsory self-accusation for it bolsters the identification and converts the speech into a response which is essentially testimonial. As the Court recognized in *United States* v. *Wade*, 388 U.S. 218, 223 (1967), it is one thing to compel speech for pre-trial identification purposes but quite another to use it to support conviction and punishment.

When an accused is compelled to speak the risk of incrimination is always high, but if the speech is admissible

at trial the state has an incentive to induce incrimination at an identification proceeding. When compelled speech is presented to a jury, incrimination may be supplied by the nature of the speech itself or by the person who repeats the testimony. The privilege against self-incrimination has been construed by this Court to protect against governmental overbearing of a person's will. As speech requires volitional cooperation, to permit government to compel it is to impair the sense of dignity and integrity which is at the heart of the Fifth Amendment.

ARGUMENT

I.

The Circumstances of Petitioner's Pre-Trial Identification and Its Use as Evidence at Trial Deny Him Due Process of Law as Guaranteed by the Fourteenth Amendment.

The decisions of this Court in *United States* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967) holding pre-trial identification in absence of counsel violates the Sixth Amendment, would require reversal in this case but for the decision in *Stovall* v. *Denno*, 388 U.S. 293 (1967), barring their retroactive effect.[6] Like Wade and Gilbert, Biggers was denied the right to the assistance of his retained counsel by the police holding a pre-trial identification proceeding in his attorney's absence.[7] The

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[6] *Stovall* v. *Denno* held that "Wade and Gilbert affect only those cases and all future cases which involve confrontations for identification purposes conducted in the absence of counsel after this date [June 12, 1967]" 388 U.S. 293, 296. The Biggers identification took place on August 17, 1965 (R. 19).

[7] Identification in this case was made before indictment, while the identifications in *Wade* and *Gilbert* were post-indictment. This difference is

Court remanded *Wade* to determine whether a subsequent in-court identification should be excluded as the tainted product of the lineup identification, while *Gilbert* excluded in-court testimony of the pre-trial identification *per se*. As petitioner was convicted on the testimony of the prosecutrix's pre-trial identification at a showup (she did not attempt to identify him at trial) where petitioner was unrepresented by counsel, Biggers would be entitled under *Gilbert* to exclusion of the identification.[8]

A. *The Failure of the Police to Hold a Lineup Violates Due Process.*

The question, therefore, is that left open in *Stovall* v. *Denno*, 388 U.S. 293, 301, 302 (1967), whether the pre-trial confrontation between petitioner and the victim "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [petitioner] was denied due process of law. This is a recognized ground of attack upon a conviction independent of any right to counsel claim. *Palmer* v. *Peyton*, 359 F.2d 199 (C.A. 4th Cir. 1966)."

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not a ground to distinguish the cases. This Court has long held that determination of the "critical stage," when the right to counsel attaches, turns upon whether the accused's *right to a fair trial* may be sacrificed or lost before trial due to the absence of counsel. *United States* v. *Wade*, 388 U.S. 218, 224-227 (1967). No particular stage of the prosecution is the "critical stage." See, *e.g.*, *Hamilton* v. *Alabama*, 368 U.S. 52 (1961) (arraignment); *White* v. *Maryland*, 373 U.S. 59 (1963) (preliminary hearing); *Massiah* v. *United States*, 377 U.S. 201 (1964) (post indictment, accused on bail); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) (pre-indictment); see *Miranda* v. *Arizona*, 384 U.S. 436, 477 (1966). The "grave potential for prejudice, intentional or not, in the pre-trial [showup]" which is manifested throughout this case leaves no doubt that the pre-trial identification of Archie Biggers "was a critical stage of the prosecution at which he was 'as much entitled to such aid [of counsel] . . . as at the trial itself.'" *United States* v. *Wade*, *supra*, 388 U.S. at p. 227.

[8] An identification of a single suspect, as distinguished from a lineup, will be denominated a "showup", following the definition in Wall, Eyewitness Identification in Criminal Cases, 27.

The accused in *Stovall* was identified without a lineup, a procedure of acknowledged suggestiveness: "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned" (388 U.S. at p. 302). Nevertheless, due process was not violated in *Stovall* solely because of exigent circumstances. The victim was in danger of death, and if an identification was to be made at all "an immediate hospital confrontation was imperative" (*Ibid.*).

The extraordinary need for an immediate identification without a lineup present in *Stovall* is completely absent here. On the contrary, at the time of the identification, Biggers was in police custody on an unrelated charge and continuously available for identification. Similarly, Mrs. Beamer was, and had been for seven months, continuously available to identify possible suspects. Her health was unimpaired, and no other factors made an immediate identification by her without a lineup "imperative." Held without exigent compelling circumstances, Biggers' showup identification violated due process under the reasoning of *Stovall* v. *Denno, supra.*

United States v. *Wade,* 388 U.S. 218 (1967) and *Gilbert* v. *California,* 388 U.S. 263 (1967) found need of impartial and selective identification procedures, and thereby the need for counsel, even when a lineup is held in part because the reliability of any identification of a stranger is severely limited by normal human fallibilities of perception and memory. A showup, on the other hand, results in the maximization of suggestion that the suspect is the guilty party and suggestion is the " 'one factor which, more than anything else, devastates memory and plays havoc with our best intended recollections * * *.' "[9] Suggestion is in large

[9] Wall, Eyewitness Identification in Criminal Cases 26.

part the product of restricted selectivity offered the witness in the identification process. Instead of being forced to choose between several persons with different heights, weights, profiles and voices, Mrs. Beamer was confronted with a single individual whose suspected guilt the police communicated by presenting him alone and in custody. The witness is free to accept or reject this police judgment, but not to choose. With good reason, therefore, the showup is labelled "the most grossly suggestive identification procedure now or ever used by the police." Wall, Eyewitness Identification in Criminal Cases 28. See also, *Stovall* v. *Denno,* 388 U.S. 293, 302 n. 5 (1967).[10]

In identifying petitioner, Mrs. Beamer relied particularly on her recollection of a voice she had not heard in seven months, but selectivity is decreased even more when identification is by voice. An identification by physical appearance may rest upon various characteristics, one or a combination of which may be particularly striking; such as the shape of a nose or mouth, skin complexion, scars, or height and weight. Voice identification rests merely upon the tone and timbre of a voice, as well as an individual's speech peculiarities.[11] When few words are spoken and no special speech peculiarities are present, as in this case, only tone and timbre are left to provide identification. Selectivity is at the barest minimum; the probability of error is maximized. Biggers, moreover, spoke

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[10] See The opinion of the Australian Court quoted in Williams, Identification Parades, Crim. L. R., 526 (1955): "The English courts treat it as indisputable that a witness, if shown the person to be identified singly and as the person whom the police have reason to suspect, will be much more likely, however fair and careful he may be, to assent to the view that the man he is shown corresponds to his recollection."

[11] Mrs. Beamer only stated that she identified petitioner's voice because "he has the voice of an immature youth. I have teenage boys and that was the first thing that made me think it was the boy" (R. 17). Thus, she relied on a voice characteristic common to boys in petitioner's age group rather than a manner of speech particular to a single person.

softly during the identification (R. 17). It is difficult to believe the intruder spoke this way during the assault and rape. The unreliability of voice identifications as compared to physical identifications, with the resultant increased necessity for a lineup, was recognized by the Fourth Circuit in *Palmer* v. *Peyton*, 359 F.2d 199, 201-202 (1966):

> "Where the identification is by voice alone, the absence of some comparison involves grave danger of prejudice to the suspect, for as one noted commentator has pointed out: '[E]ven in ordinary circumstances one must be cautious and accept only with reserve what a witness pretends to have heard * * *.'"

This Court rigorously questioned the reliability of all identification testimony in *United States* v. *Wade, supra*, and quoted with approval Mr. Justice Frankfurter's observation that: "The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials." The Case of Sacco and Vanzetti 30. If this characterization applies to an identification by lineup, where comparison and selectivity are greatest and suggestion minimal, it applies with far greater force to the showup in this case where Mrs. Beamer could only accept or reject police suspicion that Archie Biggers was the rapist, and where the showup identification was the sole evidence of guilt, see *infra* p. 17.

The holding in *Stovall* that absent unusual circumstances a show-up violates the due process rights of an accused is also soundly rooted in the policy adopted in *United States* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967). Those cases envision that "presence of counsel itself can often avert prejudice and assure a

meaningful confrontation at trial." (388 U.S. at p. 236). Suggestion is to be prevented by an attorney calling the attention of the police to identification procedures which produce it and by proposing safeguards. For the attorney to play a practically meaningful role as insurer of the integrity of the pre-trial identification proceedings, practices such as the showup which result in undue suggestion must be condemned or counsel is reduced to the role of passive observer, unable to prevent unreliability and reduced to attempting to expose it after the fact at trial. If counsel is unable to assert that a procedure as destructive of reliability as the showup is unconstitutionally suggestive, it is difficult to see how he will be able to assist law enforcement as *Wade* presupposes "by preventing the infiltration of taint in the prosecution's identification evidence" (388 U.S. at p. 238).

B. *The Circumstance of the Identification and Its Use at Trial Violate Due Process.*

This case, however, goes far beyond *Stovall, supra.* The record affirmatively shows that petitioner's identification, and the use made of it by the state, denied him the fair trial guaranteed by the Fourteenth Amendment. The circumstances which denied Archie Biggers due process will be separately examined, but, of course, their prejudicial impact upon his trial is cumulative.

First. Prior to the police call "to look at a suspect" Mrs. Beamer was particularly open and susceptible to suggestive influence. The crime had occurred seven months earlier and had lasted at the most 30 minutes; inevitably the sharpness of her memory had faded. Mrs. Beamer, by her own admission at trial, was terrified by fear of violence to herself and children. When asked (R. 14):

> Q. "Are you able to describe this man other than seeing a butcher knife?"

She replied:

> A. "No, other than I remember the blade being shiny."

The crime took place at night. Mrs. Beamer was grabbed in an unlit hallway and marched through an unlit kitchen to railroad tracks and then to a wooded area. At trial, she gave only a general explanation of the characteristics which led her to identify petitioner. As the Court said in *Wade*, the danger of suggestion is "particularly grave when the witness' opportunity for observation was insubstantial. . . ." (388 U.S. at p. 229).

Second. The police suggested that the petitioner was the rapist when they arrived at Mrs. Beamer's home and asked her to go "look at a suspect." Inherent in the word "suspect" was the suggestion that the police had sufficient evidence linking the petitioner to the crime to warrant holding him at the police station for her identification. Thus the normal expectation of a witness that the guilty person will be present at the identification was substantially increased by the police. Cf. Williams, Proof of Guilt, 96.

Third. At the station house Mrs. Beamer first saw Archie Biggers in the custody of five police officers, all of whom remained present during the identification. The sheer number of officers, implying the importance of the petitioner as a "suspect", may well have allayed any thought by the witness that this might not be "the man." [12]

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[12] On the morning of the identification the only morning newspaper in Nashville carried a front-page story of the attempted rape for which petitioner had been arrested. Biggers was not named, but he was described as a "burly 16 year-old Negro." If the prosecutrix read the article, which is not revealed in the record, the crime allegedly committed and the description of the rapist might well have influenced her identification of Biggers. The prejudicial effect of newspaper articles upon witnesses and jurors has been recognized by this Court. Cf., *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *Estes* v. *Texas*, 381 U.S. 532 (1965).

On the other hand, the number of officers may have increased her fear of contradicting the police as to the identity of a man regarded by them for reasons unknown to her as a "suspect."

Fourth. When Mrs. Beamer did not identify Biggers by his physical appearance, the police required him to speak words spoken during the attack—"Shut up or I'll kill you."—and eventually his compelled speech was presented to the jury at trial. There is little that could have been more suggestive of his guilt. Mrs. Beamer had not indicated that the rapist had particular speech mannerisms which required those words to be spoken, and even if he had had speech peculiarities he could have spoken other sentences of phrases containing each of these words. Whether or not a violation of petitioner's Fifth Amendment rights (see Argument II, *infra*) use of the rapist's precise words was unnecessarily suggestive.

Wall has evaluated the latter two suggestive techniques used in this case. He states that "As bad as a show-up is, there are a number of ways it can be made worse. • • • One method is to point out the suspect to the witness even before the showup, indicating his status as suspect. • • • If this practice is not deemed suggestive enough, then the suspect, when shown alone, can be required to act or speak in the manner in which the perpetrator of the crime is supposed to have acted or spoken, a method adopted, for example, in the Sacco-Vanzetti case." Eyewitness Identification in Criminal Cases 30.

Fifth. Archie Biggers was unprepared and unequipped to protect himself against an identification made unfair by suggestions to the witness. He was 16 years old, had a ninth grade education, and apparently no previous police

record.[13] His immaturity, relative lack of education, and unfamiliarity with police procedures combined to make it difficult for him to intelligently safeguard himself against suggestive influence at the identification. Cf. *Haley* v. *Ohio*, 332 U.S. 596 (1948); *Gallegas* v. *Colorado*, 370 U.S. 52 (1962); *In Re Gault*, 387 U.S. 1 (1967).[14] This vulnerability to police procedures suggesting his guilt was further increased by the failure to notify Biggers' family of the identification despite the fact that his mother was available, the police having notified her earlier on August 17th that her son was being held on an unrelated charge. While the nonretroactivity of the Sixth Amendment holding of *Wade, supra* and *Gilbert, supra,* precludes reversal solely on the basis of lack of counsel, the consequences of an identification proceeding held without an attorney present must be noted as they affect an accused's right to a fair trial. Cf. *Davis* v. *North Carolina,* 384 U.S. 737, 740, 741 (1966). Placed in an unfamiliar situation and seized by the natural fear of one whose liberty depends upon another, an accused is unlikely either to reconstruct completely or be capable of testifying to all the suggestive influences which would reflect on the witness' impartiality and credibility. An accused as young and inexperienced as Archie Biggers is particularly affected by these disabilities. We can never know if additional suggestive influences may have further tainted the identification in this case, but we do know that the procedure employed maxi-

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[13] A number of witnesses testified to Biggers' good character and reputation. When he took the stand, there was no attempt to impeach his credibility by introduction of a police record.

[14] What the Court said in *Haley* applies: "What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. * * * He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." (332 U.S. 596, 599-600).

mized potential suggestion without the protective presence of counsel to protect the right to cross-examine, *Pointer* v. *Texas*, 380 U.S. 400, 404 (1965).

Sixth. The pre-trial identification was exploited at trial by the State's complete reliance on the tainted identification. Although she came to within a foot of the assailant, Mrs. Beamer's young daughter could not identify Biggers. Mrs. Beamer did not attempt an in-court identification. The pre-trial identification was offered by the state and was presented emphatically to the jury as the difference between guilt and innocence. No other evidence of guilt was presented although testimony elicited by the prosecution from four police officers as to what transpired at the identification made it appear to the jury that Mrs. Beamer's testimony was corroborated,[15] see *United States* v. *Wade*, 388 U.S. at p. 247 (opinion of Mr. Justice Black). According to the prosecuting attorney, the excitement of the crime was proof of accuracy of the subsequent identification. Professor Borchard's studies show, however, "that the emotional balance of the victim or eyewitness is so disturbed by his extraordinary experience that his powers of perception became distorted and his identification is frequently most untrustworthy" Convicting the Innocent, XIII (1961). This is especially true in a rape prosecution where, as the Court has recognized, identification presents "a particularly hazard that a victim's understandable outrage may excite vengeful or spiteful motives" *United States* v. *Wade*, 388 U.S. at p. 230.

Seventh. Without exception, the state could have employed procedures to safeguard the fairness of the identifi-

[15] In Tennessee, it is not mandatory that testimony of a violated female be corroborated. *Carroll* v. *State*, 212 Tenn. 464, 370 S.W. 2d 523, 527 (1963); *King* v. *State*, 210 Tenn. 150, 357 S.W. 2d 42, 45, 46 (1962).

cation and trial but did not do so. There was no practical impediment to a lineup. The witness need not have been told Biggers was a suspect. He did not have to repeat the precise language used by the criminal. Parents and counsel were available and could have been present. The number of officers at the identification was surely excessive and their testimony at trial served only to prop up a thin case. No in-court identification was offered. It was unnecessary for the state to initiate reference to prejudicial newspaper accounts of Biggers' arrest and identification or to permit the jury to learn that Biggers spoke the words of the criminal. Finally, it may have been good advocacy for the prosecuting attorney to tell the jury that "violence and terror . . . fixes these matters indelibly in a person's mind" (R. 177) but it hardly speaks of dedication to "making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime" *United States* v. *Wade*, 388 U.S. at p. 256 (opinion of Mr. Justice White).

The unfairness which began with the police labelling petitioner a "suspect", extended through an identification replete with suggestion that he was the rapist from which he could not safeguard himself, and culminated at a trial in which the tainted identification was the sole basis of conviction. At every turn the police acted in such a way as to make a reliable identification impossible. Archie Biggers has been denied the fundamental fairness guaranteed him by the due process clause of the Fourteenth Amendment and his conviction should be reversed.

II.

Petitioner's Rights Under the Fifth Amendment Were Violated by the State's Use at Trial of What He Was Compelled to Say at a Pretrial Identification.

When petitioner was identified by the victim he was being held at the police station in the custody of five officers. Neither his parents nor attorney was present. The police brought petitioner in Mrs. Beamer's presence and required him to repeat the words spoken by the rapist at the time of the offense: "Shut up, or I'll kill you." From the sound of these few words—spoken seven months earlier during disturbing events which lasted from 10 to 30 minutes—Mrs. Beamer identified Archie Biggers as the man who had raped her. At trial, in response to questions asked by the prosecuting attorney, Mrs. Beamer and four police officers, all witnesses for the state, testified to the circumstances of the identification, including that petitioner said "Shut up, or I'll kill you." Petitioner contends that the State of Tennessee violated his privilege against self-incrimination by compelling him to speak words used by the criminal at a pre-trial identification and by introducing the compelled statement into evidence against him at trial to bolster the pretrial identification.

In *United States* v. *Wade,* 388 U.S. 218, 220 (1967), the defendant was required at the lineup to wear strips of tape such as allegedly worn by the robber and directed to say "something like 'put the money in the bag,' the words allegedly uttered by the robber." Evidence of what Wade was compelled to say and do at the lineup was introduced at trial by his counsel on cross-examination. A Fifth Amendment claim was rejected, in part, on the ground that the government did not adduce evidence of what was said or done at the lineup as part of its proof of guilt:

> Moreover, it deserves emphasis that this case presents no question of the admissibility in evidence of anything Wade said or did at the lineup which implicated his privilege. The government offered no such evidence as part of its case, and what came out about the lineup proceedings on Wade's cross-examination of the employees involved no violation of Wade's privilege. (388 U.S. at p. 223).

Petitioner submits that admission at trial of what he was compelled to say evokes "the spirit and history of the Fifth Amendment", *Schmerber* v. *California*, 384 U.S. 757, 764 (1966).[16] What Mr. Justice Black said in *Wade* applies to use of petitioner's speech: "I would reverse

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[16] Historically, there have been two views of the Fifth Amendment: one exemplified by Wigmore and one reflected by decisions of this Court. Wigmore's view, based on his understanding of the origins of the privilege, is that it is "directed at the employment of legal process to *extract from the person's own lips* an admission of guilt", 8 Wigmore, Evidence §2263 (McNaughton Rev. 1961); see *Schmerber* v. *California*, 384 U.S. at p. 762 note 7. Central to his thesis, is the belief that only the guilty avail themselves of its protection and thus, it did not apply "when there was no direct coercion by the government and when there was no formal charge to which the unanswered questions relate." *Deluna* v. *United States*, 308 F.2d 140, 145 (5th Cir. 1962); Wigmore, Nemo Tenetur Seipsum Prodere, 5 Harv. L. Rev. 71, 85 (1891). As Judge Wisdom put it in *Deluna, supra*, Wigmore's "writings are an inexhaustible quarry of quotations apt for use against the policy of privilege."

This Court, however, has never sat to enforce Wigmore on Evidence and its decisions emphatically reject a narrow or literal reading of the privilege or limitation of its protection to "direct coercion" or "formal charge." Although the language of the Fifth Amendment certainly is susceptible to narrow reading the Court held that the Amendment protects against compulsory production of potentially incriminatory written records in "the great case" (*Malloy* v. *Hogan*, 378 U.S. 1, 9 (1964)) of *Boyd* v. *United States*, 116 U.S. 616 (1886); that its exercise is not limited to criminal proceedings, *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892); *Arndstein* v. *McCarthy*, 266 U.S. 34 (1924); and applies to indirect compulsion to testify, *Griffin* v. *California*, 380 U.S. 609 (1965); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); to non-judicially compelled admissions, *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964) and to police interrogation, *Miranda* v. *Arizona*, 384 U.S. 436 (1966). By holding it

Wade's conviction without further ado, had the prosecution at trial made use of his lineup identification either in place of courtroom identification or to bolster in a harmful manner crucial courtroom identification" (388 U.S. at p. 247). Certainly, nothing in *Schmerber supra,* or *Wade supra,* should deny petitioner the protection of the privilege. The former upheld the constitutionality of extraction of a blood sample because evidence of the test was neither "testimony nor evidence relating to some communicative act or writing," but declined to adopt the Dean Wigmore's formulation of the privilege or to endorse "past applications of the distinction between testimonial compulsion and real or physical evidence." It was recognized that application of such a distinction would depend on the incriminatory circumstances of each evidentiary seizure:

> "There will be many cases in which such a distinction [between testimonial communications and real or physical evidence] is not readily drawn. Some tests seemingly directed to obtain 'physical evidence', for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or

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serves innocent as well as guilty, the Court has rejected a premise central to a restrictive conception of the privilege:

> "[R]ecent re-examination of the history and meaning of the Fifth Amendment has emphasized anew that one of the basic functions of the privilege is 'to protect the innocent who otherwise might be ensnared by ambiguous circumstantes.'" Harlan, J., *Grunewald* v. *United States,* 353 U.S. 391, 421 (1957).

Contrary to the Wigmore formulation, decisions of the Court have been more in keeping with the view of the privilege Dean Griswold has expressed, that it is "one of the great landmarks in man's struggle to make himself civilized," and should be liberally construed. Griswold, the Fifth Amendment Today (Harv. Press, 1955), p. 7.

innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment" (384 U.S. at p. 764).

Unlike petitioner's case, the lineup statements in *Wade* were not introduced at trial by the government as proof of guilt but by defense counsel on cross-examination, a distinction emphasized by the Court.

Regardless of the purpose for which initially extracted, compelled speech used as evidence at trial is testimonial communication rather than real or physical evidence. The speech is presented as proof of guilt before the tribunal which decides to convict or to acquit. No record can adequately reveal, no counsel can adequately guard against, the subtle incriminatory shading or emphasis which a witness may supply, wittingly or unwittingly, in repeating a defendant's compelled statement, in this case the inflammatory words "Shut up or I'll kill you." [17] Even if the witness repeats the speech in a neutral, detached manner the jury cannot be expected to remain untouched by the fact that the defendant played the role of the criminal. Thus, the identification itself is bolstered by evidence supplied solely as a result of compulsion of an accused. Testimony of petitioner's speech, especially when the words are those of the criminal, is "affirmative action which may not merely identify him, but tie him directly to the crime" in the eyes of the jury, *Gilbert* v. *California,* 388 U.S. 263, 291, 292 (1967) (opinion of Mr. Justice Fortas).

Identification, by whatever method, is similar to and has much the same legal effect as self-incrimination. This case illustrates that compelled speech whatever its initial

[17] "There are not many ways of writing 'tonight' but Stanislavsky used to ask his young actors to pronounce and stress it fifty different ways while the audience wrote down the different shades of feeling and meaning expressed" McLuhan "Understanding Media" 82 (Signet ed.).

purpose opens an accused to the perils of incrimination. A sixteen year old boy with no criminal record was brought into the victim's presence surrounded by policemen, without the benefit of a lineup, counsel, or family, and was compelled to utter, not some innocent phrase, but the exact words alleged by the victim to have been used by the rapist. These are circumstances calculated to induce self-accusation in the innocent-but-weak but "history teaches us that self-accusation is an unreliable instrument of detection, apt to inculpate the innocent-but-weak and to enable the guilty to escape" *United States* v. *Wade,* 388 U.S. at p. 261 (1967) (opinion of Mr. Justice Fortas). The risk of incrimination affecting the trial is confined if the state is not permitted to rely on what was said or done at the lineup. On the other hand, if the state is able to profit at trial from speech at an identification proceeding, there is incentive to induce an incriminating response.

While compelled speech maximizes the risk of incrimination, use by the state of officially compelled speech at trial is substantially unlike other required acts which have been held beyond the scope of Fifth Amendment protection, e.g., compelling a defendant to stand for the purpose of visual identification, to submit to a simple blood test, to being fingerprinted or photographed. Such acts as these require only a minimum physical cooperation which is passive in nature and no act of will. Speech entails a volitional as well as physical exertion. "Had Wade been compelled to utter these or any other words in open court, it is plain that he would have been entitled to a new trial because of having been compelled to be a witness against himself." 388 U.S. at p. 245 (Opinion of Mr. Justice Black). It is as incriminating, however, to permit another to repeat an accused's compelled speech as to force an accused to speak before the jury. If the state may compel speech for identification purposes and then employ it as

proof at trial through the mouth of one of its witnesses then the state is at liberty to compel an accused to speak the words of the criminal, or to otherwise act out the crime, before the jury. We do not believe that this Court will ever tolerate such a result because "Our history and tradition teach and command that an accused may stand mute" *United States* v. *Wade,* 388 U.S. at p. 260 (opinion of Mr. Justice Fortas).

The need for accurate pre-trial identification may suggest that an accused be forced to speak, but the very holding of *Wade* that such practice does not violate the Fifth Amendment when used solely as aid to pre-trial identification surely renders it unnecessary to permit reenactment before judge and jury where it becomes direct proof of guilt supplied solely by the involuntary actions of an accused. This distinction, between compelling speech and using compelled speech as evidence to support conviction and punishment, is at the center of this Court's decision in *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964); see also opinion of Mr. Justice White, 378 U.S. at pp. 100, 101.

It is petitioner's position that use of his compelled speech at trial is use of testimony relating to a communicative act within the scope of the privilege. We do not hesitate, however, to challenge the sense of any potentially controlling distinction between testimonial communication and real evidence for purposes of the Fifth Amendment. With deference, we think the roots of the Amendment are deeper. Its true scope protects against governmental overbearing of a person's will. An individual has the right to be protected from coercion designed to make him do something controlled only by his will, which is the heart of a person's being and the source of his individuality. To invade this sanctuary is to destroy the well-spring of his integrity and

dignity as a human being. These are values which the Fifth Amendment seeks to shield from governmental intrusion by "physical or moral compulsion," and they apply full force to the volitional cooperation inherent in compelled speech.

We recognize that the Court faces a continuing dilemma in construing the privilege because there is a natural tension between the privilege and the potentially incriminating nature of any criminal investigation. When a suspect is arrested, placed in a lineup, fingerprinted, photographed, the incriminating hammer is always cocked. On the other hand, restriction of the privilege to its narrow origin, as Wigmore would have it, would be as stultifying as carrying it to its logical end. But a construction of the privilege which turns solely on the application of a distinction between real evidence and testimonial communication fails to relate to the values the Fifth Amendment protects or its critical contemporary role as a protection of individual liberty. It was this recognization of the roots of the privilege in personal dignity that led to rejection of the Wigmore view in *Schmerber*. It would make the individual the "deluded instrument of his own conviction" in all too many cases, Mr. Justice Frankfurter in *Watts* v. *Indiana*, 338 U.S. 49, 54 (1949) quoting from 2 Hawkins, Pleas of the Crown (46 §34) (8th Ed. 1824), and contravene the "respect a government—state or federal—must accord to the dignity and integrity of its citizens" *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966).

It is degrading to require one against his will to act the role of any other person because to do so tampers drastically with personal identity. Indignity is intensified when one is forced to act the role of a criminal. The slight physical cooperation required in a blood test may not amount to unconstitutionally "forced cooperation by the

accused" but this Court should make clear that when compelled speech is offered as evidence by the state in a court of law, and used to support a jury verdict, the result is compulsory self-accusation which the Fifth Amendment will not tolerate. *United States* v. *Wade*, 388 U.S. at p. 260, 261 (opinion of Mr. Justice Fortas).

CONCLUSION

Wherefore, Petitioner Prays That the Judgment Below Be Reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 237.

ARCHIE NATHANIEL BIGGERS,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee.

BRIEF FOR RESPONDENT.

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STATE OF TENNESSEE,
Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee.

BRIEF FOR RESPONDENT.

MAY IT PLEASE THE COURT:

The respondent State of Tennessee for its brief respectfully shows to the Court:

OPINION BELOW.

The opinion of the Supreme Court of Tennessee was released on January 12, 1967, for publication and can now be found at 211 S. W. 2d 696.

JURISDICTION.

Jurisdiction was originally sought by the petitioner upon the authority of 28 U. S. C., Section 1257 (3). Certiorari was granted by this Court on June 12, 1967.

CONSTITUTIONAL PROVISIONS.

This case directly involves the Fourteenth Amendment and indirectly involves the Fifth and Sixth Amendments to the Constitution of the United States.

QUESTION PRESENTED.

Were the circumstances surrounding the identification of the petitioner by the victim such as to deny the petitioner due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE.

Mrs. Margaret Work Beamer, a Negro mother of five, testified that she was assaulted and raped by the petitioner during the night of January 22, 1965. She was wrestled to the floor by the petitioner who wielded a butcher knife. He threatened to kill both her and her daughter.

Mrs. Beamer stated that although the rape occurred after the petitioner had forced her to leave home and accompany him to a nearby wooded area, she was face to face with her assailant on the floor of the partially lighted hallway of her home (R. 14).

Mrs. Beamer, a licensed practical nurse for fifteen years, stated in the courtroom that it was the petitioner who raped her. This courtroom identification of the petitioner is found in numerous places throughout the record (R. 9, 19).

Following the rape which occurred on January 22, 1965, Mrs. Beamer was shown pictures of possible suspects on numerous occasions (R. 15). She stated that policemen came to her home with pictures and that she also went to the police station to attempt identifications (R. 15). One officer testified that Mrs. Beamer was shown thirty to forty pictures (R. 38, 39). On one occasion, Mrs. Beamer picked out a picture of a man who "had features" like her assailant (R. 15).

Mrs. Beamer identified the petitioner at the police station on August 17, 1965 (R. 16). She said that she came to the police station to identify the suspect if she could (R. 17). The identification of the petitioner by Mrs. Beamer was based upon his size (R. 17, 19), his voice (R. 17), his smooth face (R. 18), and his hair (R. 18). She stated that he had the voice of an immature youth, medium pitched and soft (R. 17).

Upon cross-examination, Mrs. Beamer stated that the police did not point out the petitioner to her but that she was able to identify him at police headquarters (R. 24). She said that the identification about which she testified represented the second time she had seen him, that she had been down to look at him before (R. 24, 25). This particular testimony was not developed further by the defense. Mrs. Beamer further stated upon cross-examination that she got a good look at the petitioner during the rape and that she knew him (R. 33, 34).

A number of police officers testified at the trial concerning the police station identification. The substance of their testimony is that Mrs. Beamer was brought to headquarters to identify, if she could, a suspect. This was not the first such suspect she had been brought in to identify (R. 65). Although counsel for the petitioner objected to the State's showing that the witness had been brought to police headquarters to attempt an identification of other suspects (R. 65), it later developed upon cross-examination that she had looked not only at pictures but at several people (R. 73). Mrs. Beamer was in one of the offices at police headquarters and the petitioner walked by in the hallway and spoke certain words. There was no lineup on this occasion. There was likewise no hesitation in her identification.

The petitioner had been arrested during the night prior to the identification by Mrs. Beamer. He was arrested in connection with a separate offense and had been taken to the Juvenile Court (R. 46), at which time he had been advised of his constitutional rights in his mother's presence (R. 52).

At the time Mrs. Beamer identified him, he was not being held for raping her.

ARGUMENT.

This Court is asked by the petitioner to reverse the holding of the Court below which upheld his conviction for rape. It was insisted in the petition seeking certiorari that the petitioner was denied a fair trial guaranteed him by the Fourteenth Amednment to the United States Constitution when he was forced to speak for identification purposes during a pretrial identification process at which time he was not represented by counsel. The respondent respectfully insists that there was no violation of the petitioner's constitutional rights with respect to the Fifth Amendment guarantee that he should not be forced to give testimony against himself or the Sixth Amendment right that he is entitled to counsel.

This Court must determine whether or not the circumstances under which the defendant was identified by Mrs. Beamer at the pretrial identification process violated the standards of a fair trial which the petitioner is guaranteed under the Fourteenth Amendment to the Constitution of the United States.

The overwhelming weight of authority including the position always taken by this Court is that it is permissible to require a suspect to speak for identification purposes at a pretrial identification. The fact that an accused is required to speak certain words for the purpose of identifying him as the guilty party does not violate the Fifth Amendment privilege. **8 Wigmore on Evidence,** Sec. 2265, pp. 386, 396 (McNaughton, Rev. 1961); **Lenoir v. State,** 197 Md. 495, 80 Atl. 2d 3 (1951); **Johnson v. Commonwealth,** 115 Penn. 369, 9 Atl. 78 (1886); **Johnson v. State (Texas),** 318 S. W. 2d 76 (1958).

The prosecution can require an accused to speak for purposes of identification and can require that he wear clothing which was worn by the guilty party. In **Barrett v. State,** 190 Tenn. 366, 229 S. W. 2d 516 (1950), the accused was required to wear a hat during the identifica-